YAP SING HOCK & ANOR.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[CRIMINAL APPLICATION NO. 44-1 & 2 OF 1989]
22 JULY 1990

COMPANY LAW: *Director - Criminal breach of trust - Financial assistance to sum company - Deceit - Definition - Financial assistance to own company - Reasonable diligence - Acquisition of own shares - Whether validly appointed as directors - Non-compliance with statutory documents - Directors in law or in the broad sense - Agents of the company - Whether monies advanced in the form of a loan - Mens rea - Wrongful gain - Wrongful loss - Dishonestly - Intention behind the transfer - Companies Act 1965, ss. 4, 67(3), 123(1), (4), 131, 132(1), 131A, 141(8), 303, 354, 369 - Penal Code, ss. 23, 24, 409, 420.*

The 1st and 2nd appellants, Y1 and Y2, the principal directors and shareholders of Yap Sing Hock Holdings Sdn. Bhd., YSH, entered into a sale and purchase agreement to buy a public listed company L, from the majority shareholders represented by the Tee family and the minority shareholders represented by AL, an advocate and solicitor. The purchase was to be financed by a syndicated loan of RM37 million from PHB; however, as a result of a shortfall of RM6 million, Y1 and Y2, by way of signed resolution, were appointed the new directors of L with the old ones resigning. In another signed resolution, Y1 and Y2 were appointed as signatories of L's bank account (the second resolution) and for the application of an overdraft facility using 3 fixed deposit receipts (the said receipts) as security. Subsequently, Y1 and Y2 applied for an overdraft from HSBC using the said receipts as security, which overdraft was approved by PW4, the bank manager of HSBC.

On 30 April 1985, Y1 and Y2 then opened an account of YSH and signed a cheque for RM12 million which was transferred from L's account to YSH's account. This money was used to make up the shortfall to L. On 10 May 1985, Y1 and Y2, in their capacity as YSH's directors, paid a sum of RM2.5 million to Ariffin & Low Securities for Y1 acquiring shares in MH.

Y1 and Y2 were charged jointly with a count of criminal breach of trust as agents of L in relation to the RM12 million and criminal breach of trust as agents of YSH in relation to the RM2.5 million under s. 409 of the Penal Code (the Code), the offence of directors giving financial assistance to their companies under s. 67(3) of the Companies Act 1965 (the Act) and a charge of deceit under s. 420 of the Penal Code. Y1 and Y2 were convicted and sentenced; they appeal on the basis that the learned Sessions Court Judge had erred in fact and in law when he found that Y1 and Y2 were the directors and agents of L.

Y1 and Y2 contend that the making of the first resolution itself did not create a valid appointment of Y1 and Y2 as directors of L as the first resolution is subject to Y1 and Y2 completing the statutory documents required under s. 123(1) (Form 45 - Consent to Act) and (4) (Form 48A - Statutory Declaration) of the Act. Further that the prosecution had failed to produce Form 48A of the Act as to change of directors and that Form 49 which Y1 and Y2 accepted were only *prima facie* evidence that they were the directors on 30 April 1985 but that this was a rebuttable presumption and that this had in fact been rebutted by the prosecution's failure to show that Y1 and Y2 had complied with s. 123(1) and (4) of the Act.

The prosecution contends that the appellants were in law directors of L as the definition of "director" under "a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act" as defined in s. 4 of the Act was wide enough to include Y1 and Y2. The prosecution contended that notwithstanding the Act, Y1 and Y2 were acting as agents under the general law.

Held:

[1] The second resolution shows that there was a change of signatories to the bank accounts of L pursuant to the acquisition by Y1 and Y2; the old directors of L would not so easily have permitted Y1 and Y2 to be signatories to L's account unless the sale of L's shares had gone through.

[2] (a) It was clear from the evidence that consonant with their having taken over L, Y1 and Y2 signed P28A after PW7 (the company secretary) was instructed to prepare it for the application for overdraft facilities dated 30 April 1985;

(b) as new directors of L, Y1 and Y2 signed the cheque which transferred RM12 million from L's account into YSH's account which Y1 and Y2 had just opened;

(c) therefore, in the commercial world, as far as PW7 was concerned, Y1 and Y2 had undoubtedly taken over control of L, both shareholdings and even the bank account.

[3] The fact that the application was approved initially by the Chief Executive of HSBC in Malaysia prior to PW4's approval is important as it cannot be said that that the Chief Executive would have approved the facility if he was not satisfied that Y1 and Y2 were the directors of L at that time.

[4] Although technically Y1 and Y2 were not directors by virtue of their not having completed and lodged the documents required by s. 123(1) and (4) of the Act but they were in law directors in the broad sense as defined in s. 4 of the Act and were directors of L for the purpose of the criminal breach of trust charges in relation to L and the offence under s. 67(3) under the Act.

[5] There was *ad hoc* agency in relation to the RM12 million by Y1 and Y2 when the RM12 million cheque was signed.

[6] It is clear that Y1 and Y2 had dominion over the RM12 million when the overdraft was approved to L as both Y1 and Y2 had the capacity and capability to transfer the RM12 million from L's account to YSH's account and also based on the law that the duties, powers and functions as directors are fiduciary for and on behalf of the company.

[7] (a) For criminal breach of trust to be committed, it is important to find whether the accused was actuated by dishonest intention or not to see if the appellants possessed the necessary *mens rea* at the time of the offence;

(b) looking at the events which transpired on 30 April 1985, notwithstanding that the transaction was open and with the connivance even of the old directors of L, the acts of Y1 and Y2 are still tainted with *mens rea* - the fact that the old directors had connived is no defence to Y1 and Y2;

(c) Y1 and Y2 had employed unlawful means in the form of the signing of the cheque for RM12 million as this caused wrongful loss to L and wrongful gain to YSH; further the transferring of the RM12 million out of L contravened s. 67 of the Act and several articles of association of L in relation to the prohibition of providing financial

assistance in the purchase of its own shares and s. 131 as to the necessity of disclosure of interest and s. 132(1) as to the lack of reasonable diligence. As a result Y1 and Y2 have abdicated and breached their fiduciary duty.

[8] (a) It cannot be said that the RM2.5 million advanced to Y1 was a loan by YSH to Y1 as YSH itself was short of money to complete the purchase of L's shares. Further, the evidence shows that shortly after Y1 and Y2 transferred the RM12 million into YSH's newly opened account, Y1 and Y2 withdrew RM6.3 million from YSH's account and paid L the shortfall. Therefore, the RM12 million was to cover the shortfall of RM6 million and payment of RM2.5 million to Ariffin & Low;

(b) when Y1 and Y2 transferred RM2.5 million to Ariffin & Low on 10 May 1985 to pay for shares of MH, they could not have given what they did not have in the first place - as the shortfall was only for RM6 million, the transfer of RM12 million was clearly in contemplation of the discharge of Y1's other debts.

[9] The learned Sessions Court Judge had correctly applied the burden of the defence in accordance with the test in *Mat's* case where the duty is not to convict but to ask correctly whether the appellants' story raised a reasonable doubt.

[Appeal dismissed.]

Cases referred to:

Ang Teck Hwa v. PP [1988] 1 MLJ 279
Branwhite v. Worcester Works Finance Ltd. [1969] 1 AC 552
Chang Lee Swee v. Public Prosecutor [1985] 1 MLJ 75
Dean v. Hiesler [1942] 2 All ER 340
Harakrishna Mahatab v. Emperor [1930] AIR Patna 209
King-Emperor v. Fazlur Rahman [1929] 9 Pat 725
Kok Hoong v. Leong Cheong Kweng Mines, Ltd. [1964] 1 All ER 300
Lai Ah Kau & Anor. v. Public Prosecutor [1988] 3 MLJ 391
Latchford Premier Cinema, Limited v. Ennion [1931] 2 Ch D 409
Lindgren & Ors. v. L. & P. Estates Ltd. [1968] Ch D 572
Mat v. PP [1963] 29 MLJ 263
Navaratnam v. PP [1973] 1 MLJ 154
Nga Te v. King-Emperor [1904] 1 Cr LJ 730
Rex v. Lee Siong Kiat [1935] MLJ 53
Selangor United Rubber Estates, Ltd. v. Cradock (a bankrupt) & Ors. (No.3) [1968] 2 All ER 1073
Shanti Prasad v. Kalinga Tubes Ltd. [1962] AIR Orissa 202
Tan Ah Ting v. PP [1974] 2 MLJ 38
Wallersteiner v. Moir [1974] 3 All ER 217

Legislation referred to:

Companies Act 1965, ss. 4, 67(3), 123(1), (4), 125(1), 130(1), 131, 132(1), 132A, 303, 141(8), 354, 369
Penal Code, ss. 23, 24, 405, 407, 408, 409, 420

Other sources referred to:

Halsbury's Laws of England p.70 para 116
Halsbury Hailsham Edn., Vol.5, pp. 299-310, paras. 512-514
Ratanlal's Law of Crimes, 22nd Edn., p. 52, pp. 53-54

For the public prosecutor - Ng Aik Guan, DPP
For the 1st appellant - Raja Aziz Addruse; M/s. Rithauddeen & Aziz
For the 2nd appellant - Abdul Kadir bin Kassim; M/s. Kadir, Tan & Ramli

JUDGMENT

Abu Mansor Ali J:

The 1st and 2nd appellants appeal against their convictions and sentences imposed by the learned Sessions Court Judge on charges as follows:

1st charge:

That you jointly on 30 April 1985, at the Hongkong and Shanghai Banking Corporation, No. 1, Jalan Bukit Timbalan, in the District of Johor Bahru, in the State of Johor, being agents of Lien Hoe Sawmill Company Sdn. Berhad to wit, directors and in such capacities entrusted with the dominion over certain property, to wit, RM12,000,000, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

Alternative charge to the 1st charge:

That you jointly on 30 April 1985, at the Hongkong and Shanghai Banking Corporation, No.1, Jalan Bukit Timbalan, in the District of Johor Bahru, in the State of Johor, being agents of Lien Hoe Sawmill Company Sdn. Berhad to wit, directors and in such capacities entrusted with the dominion over certain property, to wit, RM5,300,000, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

2nd charge:

That you jointly on 10 May 1985, in the district of Johor Bahru, in the State of Johor, being agents of Yap Sing Hock Holdings Sdn. Bhd. to wit, directors and in such capacities entrusted with the dominion over certain property, to wit, RM2,500,751 committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

3rd charge:

That you jointly on 30 April 1985, at the Hongkong and Shanghai Banking Corporation, No.1, Jalan Bukit Timbalan, in the District of Johor Bahru, in the State of Johor, being officers of Lien Hoe Sawmill Company Sdn. Berhad, to wit, directors did give financial assistance to Yap Sing Hock Holdings Sdn. Bhd. for the purpose of a purchase of 4,413,284 shares in the former company, and that you have thereby committed an offence punishable under s. 67(3) of the Companies Act 1965.

In addition to the above charges, the appellants were also charged with the following charge:

That you on 30 April 1985, at the Hongkong and Shanghai Banking Corporation, No.1, Jalan Bukit Timbalan, in the district of Johor Bahru, in the State of Johor, dishonestly induced the said bank to deliver RM12,000,000 to you by deceiving one Koon Leck Keong, the branch manager of the said bank, into believing that the purpose for the facility of a temporary overdraft of RM12,000,000 was to meet the working capital requirements of Lien Hoe Sawmill Company Sdn. Berhad, when you knew this to be false, which money would not have been delivered to you had the said Koon Leck Keong not been so deceived and that you have thereby committed an offence punishable under s. 420 of the Penal Code.

The 1st and 2nd appellants claimed trial to the charges and the 1st appellant was on 25 February 1989, convicted on the 1st charge, 2nd charge and the 3rd charge, and sentenced:

(a) to 3 years imprisonment each on the first charge and the second charge, the sentences to run concurrently; and

(b) with a fine of RM2,500 in default 3 months on the third charge,

whilst the 2nd appellant was convicted and sentenced to 2 years imprisonment in respect of the 1st and 2nd charges, the sentences to run concurrently and fined RM2,500 in respect of 3rd charge in default 3 months' imprisonment but they were acquitted without being called to make their defence on the alternative charge to the first charge and on the additional charge.

The 1st and 2nd appellants are dissatisfied with the said judgment, in so far as it relates to the said convictions and sentences.

It may be necessary to relate the facts of this case. The 1st and 2nd appellants are principal directors and shareholders (2nd appellant holding shares on trust for 1st appellant) of Yap Sing Hock Holdings Sdn. Bhd. (Holdings). Holdings entered into a sale and purchase agreement to buy a public listed company called Lien Hoe Sdn. Bhd. (Lien Hoe) from the majority shareholders represented by the Tee family and the minority shareholders represented by Mr. A. L. Looi, advocate and solicitor.

After a number of postponements involving some escalating costs to the Holdings, they were required to complete the sale by 30 April 1985. The purchase was financed by a syndicated loan with Perwira Habib Bank lending some RM37 million.

As referred to things came to a head on 30 April 1985. For the purpose of completing the sale, the 1st and 2nd appellants, their lawyer and the majority shareholders' lawyer represented by Mr. Gan Kim Sing (PW2) and the minority shareholders' lawyer, Mr. A. L. Looi and the lawyer for Perwira Habib Bank, Mr. Leong Tuck Onn all gathered at the Hongkong and Shanghai Banking Corporation (HSBC) office Johore Bahru in particular the office of PW4, the bank manager on 30 April 1985.

The sale was not about to be completed as the purchaser Holdings was short of 6 million dollars. There was a problem. To get over the impasse, the 1st and 2nd appellants were, by signed resolutions, made the new directors of Lien Hoe and the old directors signing resolution resigning from the directorship. In another resolution, the 1st and 2nd appellants were also made signatories of Lien Hoe's bank account and they also resolved that 3 fixed deposit receipts of Lien Hoe be used as security for an overdraft soon to be applied by the 1st and 2nd appellants, as the new directors of Lien Hoe. The 1st and 2nd appellants then applied for an overdraft from HSBC using the three fixed deposit receipts of Lien Hoe as security.

PW4, the bank manager of HSBC after obtaining due approval from the chief executive of the bank, approved the overdraft to Lien Hoe. The 1st and 2nd appellants, the directors of Holdings, then opened an account of Holdings at the same HSBC. As new directors of Lien Hoe, the 1st and 2nd appellants signed a cheque P15 transferring RM12 million overdraft in Lien Hoe's account into the newly opened account of Holdings. With that money, the 1st and 2nd appellants paid Lien Hoe the shortfall of RM6 million. Thus they completed the transfer. The 1st and the 3rd charges against the 1st and 2nd appellants arose out of that transaction on 30 April 1985. On or about 10 May 1985, the 1st and 2nd appellants as directors of Holdings paid a sum of RM2.5 million to Ariffin and Low Securities for and on behalf of the 1st appellant for shares acquired by the 1st appellant of Muda Holdings. For this the 1st and 2nd appellants faced the 2nd charge.

Raja Aziz Addruse appeared for the 1st appellant and En. Kadir Kassim appeared for the 2nd appellant.

The complaint of the 1st appellant and the 2nd appellant against their convictions in respect of the 1st charge (and the 3rd charge) was that the learned Sessions Court Judge erred in law and in fact when he so found that the 1st appellant and 2nd appellant in fact were agents of Lien Hoe to wit their directors satisfying, according to him an ingredient of the 1st charge and 3rd charge.

The prosecution evidence allegedly proving the 1st appellant (and the 2nd appellant) so was to be found in the evidence of Woo Min Fong (PW7) (see p. 268 Vol. 1 of appeal record) when PW7 said there exist circular resolutions certifying the appointment of new directors of Lien Hoe and the change of signatories. That document headed 'circular resolutions' of the company Lien Hoe Sawmill Company Sdn. Bhd. was marked as P28B (see p. 696 Vol. II of appeal record). P28B reads:

Appointment of New Directors

Resolved that the following three gentlemen be and are hereby appointed directors of the company subject to their completion of the statutory documents as required under s. 123(1) and (4) of the Companies Act 1965:

(a) Dato' Yap Sing Hock (I/C.0684644) 1-A, Jalan Stulang Darat, Johore Bahru, Johore.

(b) Yap Seng Chang (I/C.4112475) 72-A, Jalan Mahkota, Taman Iskandar, Johore Bahru, Johore.

(c) Abdul Hamid bin Mohd Tahir (I/C.3735688)

21, Jalan K-4, Taman Tampoi Baru, Johore Bahru, Johore.

By virtue of P28B, the learned Sessions Court Judge found the 1st and 2nd appellants become new directors of Lien Hoe. Woo Min Fong (PW7) however at pp. 272 and 273 of the appeal record, according to 1st and 2nd appellant's Counsels, shed more light on this important Exhibit. PW7 said he was asked by Mr. Gan Kim Sing (PW2) to bring to the bank three unsigned sets of circular resolutions (P28 referred to) dated 30 April 1985. These three did not include the resolution making the application for an overdraft (P28A). This according to PW7 was prepared later on the instructions of 1st appellant to PW7, roughly according to PW7, at about 3 p.m. or so after PW7, as he preferred to put it, after Dato' Yap's group gained control or when the new board came in. PW7 confirmed all the resolutions were signed one after the other.

It was contended by 1st appellant's Counsel and so says that 2nd appellant's Counsel on the facts as narrated above the making of the resolution itself did not create a valid appointment of the 1st and 2nd appellants as directors of Lien Hoe as P28B (see p. 696 of appeal record Vol. II) is subject to the 1st and 2nd appellants completing the statutory documents required under s. 123(1) and (4) of the Companies Act 1965.

Section 123(1) reads:

123.(1) A person shall not be named as a director or proposed director in the memorandum or articles of a company or in a prospectus or a statement in lieu of prospectus unless before the registration of the memorandum or articles or the issue of the prospectus or the lodging of the statement in lieu of prospectus (as the case may be) he has by himself or by his agent authorised in writing for the purpose signed and lodged with the Registrar a consent in writing to act as a director and:

(a) signed the memorandum for a number of shares not less than his qualification, if any;

(b) signed and lodged with the Registrar an undertaking in writing to take from the company and pay for his qualification shares, if any;

(c) made and lodged with the Registrar a statutory declaration to the effect that a number of shares, not less than his qualification, if any, is registered in his name; or

(d) (in the case of a company formed or intended to be formed by way of reconstruction of another corporation or group of corporations or to acquire the shares in another corporation or group of corporations), made and lodged with the Registrar a statutory declaration that he was a shareholder in that other corporation or in one or more of the corporations of that group, and that as a shareholder he will be entitled to receive and have registered in his name a number of shares not less than his qualification, by virtue of the terms of an agreement relating to the reconstruction.

Subsection (4) of s. 123 of the Act reads:

(4) Every person shall before he is appointed a director of a company make and lodge with the Registrar and the official receiver a statutory declaration in the form prescribed by regulations that he will not be acting in contravention of ss. 125 and 130.

Section 125 of the Act reads:

125.(1) Every person who being an undischarged bankrupt acts as director of, or directly or indirectly takes part in or is concerned in the management of, any corporation except with the leave of the Court shall be guilty of an offence against this Act.

Penalty: Imprisonment for three years or ten thousand ringgit or both.

(2) The Court shall not give leave under this section unless notice of intention to apply therefore has been served on the Minister and on the official receiver and the Minister and the official receiver or either of them may be represented at the hearing of and may oppose the granting of the application:

Section 130 of the Act reads:

130.(1) Where a person is convicted whether within or without Malaysia:

(a) of any offence in connection with the promotion formation or management of a corporation;

(b) of any offence involving fraud or dishonesty punishable on conviction with imprisonment for three months or more; or

(c) of any offence under ss. 132, 132A or 303,

and that person, within a period of five years after his conviction or, if he is sentenced to imprisonment, after his release from prison, without the leave of the Court is a director or promoter of or is in any way whether directly or indirectly concerned or takes part in the management in Malaysia of a corporation he shall be guilty of an offence against this Act.

Penalty: Imprisonment for three years or ten thousand ringgit or both.

(2) A person intending to apply for the leave of the Court under this section shall give to the Registrar not less than ten days' notice of his intention so to apply and the Registrar shall be made a party to the proceedings.

(3) On the hearing of any application under this section the Registrar may oppose the granting of the application.

The learned Counsel for 1st appellant and 2nd appellant further submitted that since the 1st appellant (as well as the 2nd appellant) had not so completed the statutory forms and no evidence having been led by the prosecution that the 1st appellant and 2nd appellant had been validly appointed by their due compliance with the statutory requirements, which onus,

according to appellant is on the prosecution as they are the ones that say the appellants acted in their capacity as agents, to wit, directors, they therefore had in fact not been validly appointed so.

The 1st and 2nd appellants' Counsel say rather forcefully that in fact the prosecution failed to produce Form 48A of the Companies Act giving change of directors. It is in evidence clearly, they submitted, that at 3.30 p.m. or 4.00 p.m. all parties concerned in trying to complete the transfer transaction were still at the premises of the Hongkong and Shanghai Bank all trying to work on the loan of RM12 million.

The 1st and 2nd appellants' Counsel contended that the learned Sessions Court Judge erred in concluding the 1st appellant and 2nd appellant were directors on 30 April 1985 of Lien Hoe when he accepted the certificate P24 issued under s. 141(8) of the Companies Act which reads:

> (8) A certificate of the Registrar stating that from any return lodged with the Registrar pursuant to this section it appears that at any time specified in the certificate any person was a director manager or secretary of a specified company shall in all Courts and by all persons having power to take evidence for the purposes of this Act, be received as *prima facie* evidence of the facts stated therein and for the purposes of this subsection a person who appears from any return so lodged to be director manager or secretary of a company shall be deemed to continue as such until by a subsequent return so lodged or by a notification of change in the prescribed form so lodged it appears that he has ceased to be such a director manager or secretary.

The 1st appellant's Counsel joined by the 2nd appellant's Counsel submitted the Form 49 (at pp. 684 and 685 of appeal record Vol.II) show *prima facie* evidence that the two appellants were directors on 30 April 1985. He submitted under s. 141(8) of the Companies Act it only creates a rebuttable presumption. As to meaning of *prima facie*, the 1st appellant's Counsel cited *Tan Ah Ting v. PP* [1974] 2 MLJ 38 where Wan Suleiman FJ, as he then was, quoted with approval Gordon-Smith Ag. J.A.'s adoption of the definition (of *prima facie*) given in *Whiteley's Dictionary*:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

Counsel submitted that it is clear law that anything that is *prima facie* can be rebutted by evidence. He added that it is his submission that the certificate P24 showing the 1st and 2nd appellants *prima facie* being directors had been duly rebutted by the prosecution's failure to show that the 1st and 2nd appellants had complied with s. 123(1) and (4) of the Companies Act on 30 April 1985. Counsel submitted further by this prosecution's failure to prove so s. 141(8) presumption has therefore been rebutted.

He submitted and this was supported by 2nd appellant's Counsel, in law the purported appointments of the 1st and 2nd appellants had not become effective as at 30 April 1985. He reiterated the only directors of Lien Hoe on 30 April 1985 were, according to 1st appellant's Counsel were those who purported to appoint the appellants by the resolutions P28B.

The learned Counsel for 2nd appellant in supporting the submission of Counsel for 1st appellant elaborated further and contended that his client was never a director of Lien Hoe on 30 April 1985 because of the several statutory requirements required of him not having been completed at the relevant time when he signed cheque P15. He went further to state

the signing and filing of consent under s. 123(1) to act as a director and declaration under s. 123(4) had not then been filed and could not have been filed. Those documents were prerequisite to the 2nd appellant and 1st appellant becoming directors and had to be attested. At the meeting of 30 April 1985 none of the signatories who were capable of attesting were present. After they had been attested, they had to be lodged with the Registrar of Companies. In short, there is no evidence that Form 45 (consent under s. 123(1)) and Form 48A (s. 123(4)) declaration having been filed at the relevant time.

The learned deputy Mr. Ng Aik Guan for the prosecution in reply in respect to the 1st charge submitted the real issue that falls for determination by the Court in a charge under s. 409 of the Penal Code was whether at the material time the 1st (and 2nd appellant) were agents. On this issue, he stated the appellants' Counsels strayed somewhat.

The learned deputy contended that the 1st and the 2nd appellants were in law directors of Lien Hoe on 30 April 1985. This is so, he submitted because the definition of "director" under s. 4 of the Companies Act 1965 was wide enough to include "a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act". The learned deputy submitted that if the above broad limb under the definition of director is relied upon there exist sufficient evidence to the effect that on 30 April 1985 the 1st appellant (and the 2nd appellant) in fact put on the mantle of directors of Lien Hoe when PW2 at pp. 75 - 76 of appeal record said that 1st appellant as director of Lien Hoe instructed that the cheque P15 be prepared. It was also PW2's evidence that it was the 1st accused who requested him to write cheque P14 (p. 212 of appeal record).

The evidence was supported by the evidence of Woo Min Fong (PW7) the company secretary who testified that there was a change of signatory to the bank account of Lien Hoe pursuant to the acquisition. PW7 also said it was the 1st appellant who gave instruction to prepare P28A (application for overdraft) facilities for Lien Hoe. This P28A came into being according to PW7 after the 1st appellant gained control of Lien Hoe.

Not to be missed is the evidence of Koon Leck Keong (PW4) the HSBC bank manager who testified that he could only consider the overdraft application after he was satisfied that the 1st appellant had gained control of Lien Hoe. PW4 confirmed the terms of the loan to Lien Hoe *vide* letter of approval P31. The 1st and 2nd appellants accepted the terms and conditions on behalf of Lien Hoe. PW4 also confirmed that the 1st appellant's application for overdraft was after the 1st appellant had acquired control of Lien Hoe. PW4 was certain that the 1st appellant had gained control when he represented he had authority to discuss the overdraft. PW4 said he knew the 1st appellant had assumed control because new current account signature cards were asked for to change the company's signatories.

The learned deputy submitted that on the evidence on 30 April 1985, 1st appellant and 2nd appellant were in law directors of Lien Hoe and thereby acted as agents for Lien Hoe. This is reinforced by Exhibit P24, the certificate Form 49 return. He also submitted that s. 141(8) presumption and Article 100 of Lien Hoe's articles of association (P22) were not rebutted.

The learned deputy submitted that even if the Court is not satisfied that the 1st and 2nd appellants were directors because of non-compliance with s. 123(1) and (4) nonetheless on that evidence by all outward appearance and for all intents and purposes at the relevant time when P15 was signed, the 1st and 2nd appellants were directors of Lien Hoe and therefore according to the Deputy, Lien Hoe's agents following the requirement of s. 409 of the Penal Code. For the instances when the 1st appellant and 2nd appellant acted as agents, the learned deputy referred the Court to the same pieces of evidence of PW2, PW4 and PW7 in particular

the evidence that point out to 1st appellant and 2nd appellant being such agents of Lien Hoe when applying for overdraft facility, in accepting the overdraft terms, in issuing a cheque for RM12 million (P15). 1st appellant and 2nd appellant also became new signatories of Lien Hoe bank account. When the 1st appellant gave evidence, he also made admission that he was Lien Hoe's agent on 30 April 1985 (see p. 422B-F, p. 423D - p. 424B, p. 427A - C of appeal record).

In so far as the old directors of Lien Hoe having resigned on 30 April 1985, the learned deputy submitted they had effectively resigned as evidenced by the 2nd and 3rd sets of resolutions in P28 dated 30 April 1985. The learned deputy cited *Latchford Premier Cinema, Limited v. Ennion* [1931] 2 Ch. D. 409 where it was held a verbal notice of resignation by a director at a general meeting of the company and accepted by the meeting was valid.

The old directors' resignation are recorded in Exhibit P24 (p. 684 of appeal record).

In reply to the learned deputy's submission, the Counsel for the 1st and 2nd appellants submitted that it was the prosecution's stand that the appellants were agents by their being directors. The prosecution cannot now resile from that position and wish to rely on the general law that they were agents nonetheless when they signed P15 since there is the specific finding of the learned Sessions Court Judge on the issue was that they were directors.

Appellant's Counsel submitted that the learned deputy, in his argument said the appellants had 'assumed' the role of *de facto* directors, had tried to bring in the principle of estoppel. Counsel submitted there can be no such estoppel and cited *Kok Hoong v. Leong Cheong Kweng Mines, Ltd.* [1964] 1 All ER 300, 307 where Viscount Radcliffe at p. 308 said:

> Similarly, there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction on which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel.

Appellant's Counsel also cited *Shanti Prasad v. Kalinga Tubes Ltd.* AIR [1962] Orissa 202 in support of that proposition. Finally Counsel for the appellants submitted that in considering whether the 1st and 2nd appellants were directors for the purpose of a criminal charge, their appointment must be strictly proved. For this Counsel cited *Dean v. Hiesler* [1942] 2 All ER 340, where the King's Bench Division held that the respondent, who had not been duly appointed, could not be a director of the company within the meaning of Defence (General) Regulations, reg. 91.

The issue before the Court therefore was whether the 1st appellant and 2nd appellant were agents, to wit, directors of Lien Hoe at the relevant time when the cheque for RM12 million (P15) was signed.

With respect, I do not find any merit in the arguments of appellants' Counsel that they were not directors at that time. I find they were so.

First I dispose of the case of *Dean v. Hiesler* quoted above to be of no relevance. The editorial note of that case says:

> (Editorial note. This case raises a purely technical question of the construction of the regulation, and, in construing the Defence (General) Regulations, the Court has derived little help for the definition of the office and duties of a director in the Companies Act 1929. The regulation being one imposing a penalty falls to be construed strictly, and it is, therefore, necessary for the prosecution to prove that the director was duly appointed as such and it is not sufficient that he purported to be and to act as a director.

As to director, see *Halsbury*'s, *Hailsham* Edn., Vol. 5, pp. 299-301, paras. 512-514; and for cases see *Digest*, Vol. 9, pp. 433 - 442, Nos. 2823-2868.)

I am of the view the *Dean v. Hiesler's* case is of little assistance to the Court.

I, however, find there are compelling reasons for saying the 1st and 2nd appellants were directors of Lien Hoe at the relevant time.

The Court is satisfied it was clear from the evidence of Woo Min Fong (PW7) the chartered secretary who confirmed at p. 268 of the appeal record that there was a change of signatories to the bank accounts of Lien Hoe pursuant to the acquisition by the 1st and 2nd appellants. This was supported by a circular resolutions P28B.

I am of the view that much can be read in this evidence. The old directors of Lien Hoe would not so easily have permitted the 1st appellant and 2nd appellant to be signatories of Lien Hoe's account unless the sale of Lien Hoe's shares were through. I think this is more than obvious. PW7 testified so at same page of the appeal record.

After the take over, it was clear from the evidence at pp. 268 and 269 of the appeal record that the 1st and 2nd appellants consonant with their having taken over Lien Hoe signed the resolution P28A after PW7 was instructed to prepare it to apply for overdraft facilities of RM12 million dated 30 April 1985. As new directors of Lien Hoe, 1st and 2nd appellants signed the cheque P15 transferring RM12 million from the account of Lien Hoe into the account of Holdings which the 1st and 2nd appellants just opened. In all from the sum total of PW7's evidence in the commercial world the 1st and 2nd appellants had undoubtedly, to him, taken over control of Lien Hoe, both the shareholdings and finally even the bank account to top it all.

It may be useful to see how the 1st and 2nd appellants' transition into the board of Lien Hoe at that very relevant time was viewed by another important member of the business or commercial community. He was PW4, the manager of Hongkong and Shanghai Banking Corporation (HSBC). PW4 who at pp. 100 and 101 of the appeal record said he could only entertain Lien Hoe's application for overdraft facilities after the necessary documents were completed, that is, the board resolutions of Lien Hoe confirming application for the facilities and pledging the fixed deposit receipts, memorandum of deposit and actual deposit themselves all, we must not forget, were signed by the 1st and 2nd appellants as directors of Lien Hoe. The application for the facilities was approved and most important of all approved after the application was earlier approved by the chief executive of HSBC in Malaysia in Kuala Lumpur after PW4 referred the matter of Lien Hoe's application to him. It cannot be thought of that the chief executive of HSBC was not satisfied who were the directors of Lien Hoe at that time before approving a facility of that sum which PW4 had no authority to approve.

In view of the above evidence, I am in agreement with the submission of the learned deputy that although technically the 1st and 2nd appellants were not directors by virtue of their having not completed and lodged the documents required by s. 123(1) and (4) of the Companies Act but I hold they were in law directors as defined in s. 4 which reads:

"director" includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director.

where the technicality is so trivial and can be so easily regularised without much ado. I therefore hold that 1st and 2nd appellants were agents, to wit, directors of Lien Hoe, they were so directors for the purpose of the 1st and 3rd charges.

The learned deputy submitted that what must be appreciated is that there can be *ad hoc* agency in this case of the RM12 million by the 1st and 2nd appellants when the RM12 million cheque was signed. I uphold that submission and I am fortified in my view by what Wee Chong Jin CJ (Singapore) in *Ang Teck Hwa v. PP* [1988] 1 MLJ 279, 285 said when he quoted with approval the House of Lords' decision of Lord Morris in *Branwhite v. Worcester Works Finance Ltd.* [1969] 1 AC 552:

> In my view, these two cases do not assist the appellant. The passage cited indeed recognises that while there is no rule that there would be a general agency between the dealer and the finance company, the dealer "may well have in a particular case some *ad hoc* agencies to do particular things on behalf of one or the other or it may be both.

And in *Branwhite*, Lord Morris made it clear that:

> Issues as to agency are mainly to be determined as questions of fact. Furthermore, they often need to be determined by reference to some particular moment of time or by reference to different moments of time. A dealer may in some circumstances be held out by a finance company as their agent. A dealer may in express terms be made an agent. A dealer may for some *ad hoc* purpose be the agent of a finance company. (At p. 573).

I go now to deal with the 2nd ingredient. On the 2nd ingredient, 1st and 2nd appellants Counsels' contention was that the learned Sessions Court Judge erred when he held at pp. 582 and 583 of the appeal record Vol.II or appears to have concluded that since the learned Judge had held the 1st and 2nd accused were directors *per se* they were therefore entrusted with dominion over the RM12 million.

Learned Counsel for the 1st appellant (and 2nd appellant jointly) urged on the Court to look at the difference between the appellants' liability for their conduct in criminal law and civil law. On the principle of holding out no matter that the 1st and 2nd appellants had not been validly appointed but if so held out, then Lien Hoe would be liable but in criminal law they submitted if the appellants had not been validly appointed the appellants are not directors and they say, they cannot be said to have entrustment or dominion for the purpose of s. 409 read with s. 405 of the Penal Code.

He submitted further that their positions were as directors elect and 1st and 2nd appellants did not have even fiduciary relationship to it. 1st appellant's Counsel cited (*Lindgren & Ors. v. L. & P. Estates Ltd.* [1968] Chancery Division 572, 574 where the Court of Appeal held *inter alia* that although at the time of entering into a contract, the chairman of the public company and the first plaintiff were prospective directors of the defendant company, they owed no duty to it at that time as "directors-elect".

The 1st appellant's Counsel also submitted that the learned Sessions Court Judge had wrongly held *Lai Ah Kau & Anor. v. PP* [1988] 3 MLJ 391 to be applicable when the facts of that case are different and are distinguishable from the present case in that in *Lai Ah Kau*, the directors had total control of the company.

First appellant's Counsel submitted that from the sequence of events of what transpired at the bank at the relevant time that the 1st (and 2nd appellant) were appointed as directors, the old directors had not resigned. This can be discerned from the following events.

On 30 April 1985 morning, the vendors and the appellants were all interested to complete the much postponed purchase. The vendors produced the fixed deposit receipts and an overdraft application was made. The vendors purported to appoint the 1st and 2nd appellants as directors of Lien Hoe. Upon the bank manager giving approval of the overdraft, the Holdings account was opened by the appellants at the HSBC. The 1st and 2nd appellants

issued the cheque for RM12 million from Lien Hoe to Holdings. Immediately after that the appellants issued a cheque from Holdings for RM6.3 million to make up for the difference. The resignation of the old directors were only submitted by the lawyers and received after 30 April 1985. As to the mode of resignation was provided for by art. 79(e) of Lien Hoe's articles of association that directors resign by a notice in writing to the company. From Exhibit P24 at p. 685, Vol. II the resignation were only received on 10 May 1985. Counsel submitted the resignation letters being in the hands of lawyers did not comply with art. 79 thereof.

The first appellant's Counsel further submitted that because the 1st appellant (as well as the 2nd appellant) had not been validly appointed for reasons advanced earlier, he urged the Court to find there was therefore an error where the learned Sessions Court Judge found that the appellants were entrusted with dominion over the RM12 million facilities granted to Lien Hoe when they signed the cheque P15. For the proposition that appellants had no such dominion he cited *Chang Lee Swee v. PP* [1985] 1 MLJ 75, 77 where in the face of the clear resolution of the board that the managing director Tan Hooi Bing having been delegated all the powers of the board other than powers to borrow and make calls on its behalf, the appellant financial director was held by the Supreme Court not to be entrusted or to have complete dominion over its funds transferred to a sister company.

Appellants' Counsel urged on the Court to apply this case to the present appellants who were not even directors, clearly had not taken over when they signed P15.

The 2nd appellant's Counsel adopted the argument of 1st appellant that the 2nd appellant could not have dominion when the old directors were still in their places.

On this issue of whether there was dominion or entrustment, the learned deputy follows his submission in the case of the 1st ingredient which is that the 1st and the 2nd appellants were directors of Lien Hoe at the relevant time. If the Court says they were directors, they must have dominion. On the other hand, if the Court's decision was 1st appellant and 2nd appellant were not directors, then, as he had submitted under the second limb of his submission the 1st and 2nd appellants were agents still coming within the requirement of s. 409 of the Penal Code. The learned deputy further submitted if the Court agrees that they were agents, then on the evidence as set out, it was clear there was entrustment by Lien Hoe to the 1st appellant and 2nd appellant or dominion over Lien Hoe's account as agents to issue cheque P15 and to operate the account.

Similar to his submission in the case of the 1st charge he submitted that the old directors according to PW7's evidence at the relevant time had effectively resigned leaving only 1st appellant, 2nd appellant and A. Hamid as directors of Lien Hoe.

On this point of entrustment, the learned deputy submitted that entrustment must be construed broadly as to include a situation where the 1st appellant (and 2nd appellant) were placed by Lien Hoe. For this proposition he cited *Rex v. Lee Siong Kiat* [1935] MLJ 53 where Terrell J said:

> But the word 'trust' in the expression 'criminal breach of trust' as found in the Penal Code, is used in a far wider and more popular sense ... In s. 407 a person entrusted with property may be a carrier ... in s. 408 a clerk or servant; and in s. 409, a public servant, merchant, factor, broker, attorney or agent.

On this issue, I have already, in considering the 1st ingredient whether 1st and 2nd appellants were agents, to wit, directors, made a finding they were at the relevant time directors of Lien Hoe. Over and above that they were directors, I also found as fact the 1st and 2nd appellants had dominion and did exercise dominion over the RM12 million assets of Lien Hoe. The old

directors allowed the 1st and 2nd appellants to utilise the three fixed deposit receipts of Lien Hoe, they allowed them to be signatories to Lien Hoe's bank account to apply and to seek approval for the 12 million dollars facilities in the form of overdraft. Their application met the requirements of PW4 (the bank manager of HSBC) and it must be emphasised because PW4 had no authority to give such approval the application met the prior approval of the bank's chief executive in Kuala Lumpur. On this evidence, I am more than satisfied that the 1st and 2nd appellants had dominion over the RM12 million when the overdraft was approved to Lien Hoe. Clear proof of his dominion is the capacity and the capability of the 1st and 2nd accused to have the RM12 million transferred from Lien Hoe to Holdings' account just opened by them. PW4 honoured the cheque P15, as according to PW4, it met all requirements. With due respect, I also reject the argument of the appellants' Counsel, on this ingredient, that the 1st and 2nd appellants did not have dominion in respect of the RM12 million. I make this finding answering the appellants' contention in respect of the 3rd charge as well. I am fortified in my view by this illuminating passage from the dictum of Ungoed J in the case of *Selangor United Rubber Estates Ltd. v. Cradock (a bankrupt) & Ors.* (No.3) [1968] 2 All ER 1073, 1091:

> 1. Directors as trustees of their companies' funds. The first question of law that arises is how far directors are trustees of their companies' funds. It is clear and not disputed that they owe a fiduciary duty to the company to apply its assets only for the purpose of the company and are therefore liable for breach of that duty; but the question how far they are trustees bears on the question how other defendants can be made liable as constructive trustees as claimed.
>
> On occasion directors have been said to be trustees and on occasion not to be trustees.
>
> Directors are clearly not trustees identically with trustees of a will or marriage settlement. In particular, so far as at present relevant, they have business to conduct and business functions to perform in a business manner, which are not normally at any rate associated with trustees of a will or marriage settlement. All their duties, powers and functions *qua* directors are fiduciary for and on behalf of the company. So property in their hands or under their control is theirs for the company, that is, for the company's purposes in accordance with their duties, powers and functions.
>
> A bank credit differs, however, from such unpaid debts which a trustee has to get in - to get in, be it observed, perhaps by having it paid into the trust bank account - and it differs from the ordinary commercial debts owing to a company. In general, the bank's debt to its customer for the credit in his account, though legally a debt, is, in substance an every day experience and conduct of our affairs, moneys within the control of the customer- the customer's moneys at the bank, cash at the bank. In the present case there is no dispute about the fact of payments of the plaintiff company's moneys out of the plaintiff company's bank accounts but only of their nature and significance and whether they amounted to a misapplication. The very application of the plaintiff company's moneys of which complaint is made by the plaintiff company would have been impossible if the defendant directors did not have and exercise effective control of these moneys. Those directors were the only directors of the company and the directors who were authorised to operate the company's bank account. Indeed, a crucial part of the defence (namely that which relies on the conclusiveness of the mandate) is that they had that control.

Now on the 3rd ingredient the necessity for *mens rea*. The 1st appellant's Counsel submitted and supported by 2nd appellant's Counsel that whichever limb of ingredient No. 3 is relied on by the prosecution they must prove *mens rea*. They submitted further that when the learned Sessions Court Judge found that appellants' acted dishonestly with regard to the payment of RM12 million from the account of Lien Hoe to Holdings he did not consider the evidence of the prosecution as a whole.

Counsel repeated his earlier submission that the purpose of appellants' and vendors' meeting at the PW4's bank manager's office on that 30 April 1985 morning was to expedite completion of their purchase of Lien Hoe's shares. It involved the obtaining of overdraft from the HSBC by the use of Lien Hoe's 3 fixed deposit receipts. During the transaction, two lawyers PW2 (acting for Holdings and the majority holders of Lien Hoe) and Mr. Leong Tuck Onn (for Perwira Habib Bank which was lending RM37 million for the purchase) were present. Counsel submitted it would not be improper to infer all parties were acting with legal advice.

Counsel further submitted that if what was done was by the consent of all parties concerned (all current shareholders and directors of Lien Hoe who had not then resigned) it would be far-fetched to point to the appellants and accuse them of acting dishonestly.

Counsel submitted the learned Sessions Court Judge's grounds for his conclusion of the 1st appellant's (and 2nd appellant's) guilt could not be supported for the following reasons:

(1) The appellant submitted the learned Sessions Court Judge did not appreciate the issue when he concluded thus:

(1) Both the accused were at the HSBC on 30 April 1985. From the evidence it would not be possible to say that they were not aware of the happenings or what took place in PW4's office. Even though the first accused was the driving force in calling the shots, the second accused could not be said to be ignorant as he was one of the co-signatories of P15. He even assisted in approving P36, that is, the payment voucher of the RM6.3 million, thus showing that mentally he was alert to the proceedings.

(2) His finding that there was a dishonesty because there was no approval or board resolution for the RM12 million. The appellants submitted the absence of resolution does not necessarily point to a dishonest intention.

The old directors who had not resigned should be held responsible for the absence of any resolution.

(3) As to learned Sessions Judge's imputation in para. 3 that PW5 (accountant of Lien Hoe) was kept in the dark, Counsel submitted the learned Sessions Court Judge has taken it out of context. There is no concealment of the payment of RM12 million by the appellants when all knew he had taken over Lien Hoe.

(4) As to ground 4, the learned Sessions Judge's discounting of other shareholders in the signing of P15 was not supported by the clear evidence of the purpose of the 30 April 1985 meeting at the HSBC to get an overdraft and they were part of that meeting.

(5) Of ground 5 when he said money RM12 million moved from Lien Hoe to Holdings due to action of the appellants, Counsel submitted it was made possible by the current directors of Lien Hoe providing as security fixed deposit of Lien Hoe about RM12 million.

(6) 1st appellant's Counsel contended the learned Sessions Judge's focussing only on the 1st appellant failed to take into account the active participation of the other parties, the vendors and the part played by Perwira Habib Bank whose Counsel was present. He said the payment of the RM12 million from overdraft of Lien Hoe was known to old directors of Lien Hoe who had then not resigned.

Counsel submitted further the learned Sessions Court Judge failed to take into account facts favourable to the appellants in coming to his conclusion. Counsel submitted further on the evidence there was no *prima facie* case made out against the appellants and their defence should not have called on the 1st charge.

On the question of dishonesty in order to discover whether there was such the 2nd appellant's Counsel urged the Court to have an overview of 30 April 1985 meeting, its antecedent, what transpired at that meeting and what happened after. He urged the Court to bear in mind the principal players and the active and extensive role of Mr. Gan Kim Sing (PW2) from start to finish re completion of the purchase. Counsel says he was the co-ordinator for completing sales of purchase. Apart from that he was the conduit through which the minority shareholders were informed of what transpired. It must not be lost sight of that apart from PW2 there was Mr. Leong Tuck Onn representing Perwira Habib Bank who was interested in the fate of the syndicated loan of which they are co-manager.

Second appellant's Counsel further submitted that he adopted 1st appellant's Counsel's submission on this ingredient and he joined him in his contention that the 2nd appellant, on that evidence should never have been called to enter his defence.

In short, the appellants say everything was 'open' and done according to legal advice.

The learned deputy conceded there was 'openness' and even the connivance of the old directors on what transpired at the HSBC on 30 April 1985 but he submitted further it does not preclude the Court from examining the 1st appellant's and 2nd appellant's acts whether they were dishonest within the meaning of 'dishonestly' under s. 409 of the Penal Code since that word carries a technical meaning. He says s. 24 of the Penal Code reads:

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly" and under s. 23 of the Penal Code wrongful gain is:
>
> "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled". "Wrongful loss" is the loss of unlawful means of property to which the person losing it is legally entitled.

The learned deputy cited *Ratanlal's Law of Crimes*, 22nd Edn., pp. 53 - 54 and p. 52, case of *Nga Te v. King-Emperor* [1904] 1 Cr. LJ 730, 731, *Ratanlal* pp. 84 - 85 and the case of *King-Emperor v. Fazlur Rahman* [1929] 9 Pat. 725 - for the meaning of 'dishonestly'.

The learned deputy submitted further in deciding this issue, he urged the Court to look at the evidence if the 1st appellant (and the 2nd appellant) had acted 'dishonestly' in that by their acts, they caused wrongful loss to Lien Hoe or did cause wrongful gain to Holdings which must have been done by unlawful means including omission which may furnish ground for a "civil action".

On this point, Counsel for the 1st and 2nd appellants replied the narrow view as submitted by the learned deputy is no longer favoured. He submitted the Courts now take a broader and more pragmatic approach. They cited *Chang Lee Swee v. Public Prosecutor* [1985] 1 MLJ 75, *Ang Teck Hwa v. Public Prosecutor* [1988] 1 MLJ 279 and they say cases like *Nga Te v. King-Emperor* [1904] 1 Cr LJ 730 and *King-Emperor v. Fazlur Rahman* [1929] 9 Pat. 725 can no longer be applicable. To this learned deputy replied in none of those cases giving the so-called modern approach was the proper meaning of 'dishonestly' as defined in the Penal Code was taken or discussed. He urged the Court to re-examine this question.

I must dispose of the allegations of the learned deputy that the subject of 'wrongful loss' and 'wrongful gain' was not discussed in those cases. We notice that in *Chang Lee Swee v. PP* [1985] 1 MLJ 75 at 82 His Lordship Justice Gunn Chit Tuan J (as he then was) said:

> In effect it was his (DPP's) contention that the appellant had intended to cause wrongful loss to TDMB and wrongful gain to KJDB thus making the transfers dishonest within the meaning of s. 405 of the Penal Code and that there was therefore a *prima facie* case against him.

The learned Judge allowed the appeal and held there was no dishonest intention because he held TDMB and KJDB were related companies in the NADEFINCO group and the transfer of funds from one company to another member of the group was an on-going business practice, even before the appellant was appointed as a financial director, disclosed in the books of the companies, subjected to audit reports annually and brought to AGM. In the case before him, there was similar disclosure by the appellant. That was the reason the learned Judge held at p. 76 thus:

> (2) If the learned President had asked the question and considered all the evidence adduced, both oral and documentary, in this case she could have come to the conclusion that there was no dishonest intention on the part of the appellant to cause wrongful loss to TDMB or wrongful gain to KJDB and should not have called for the defence.

What is important to consider therefore is not the plain matter of transfer but the intention behind the transfer. In *Harakrishna Mahatab v. Emperor* AIR [1930] Patna 209 quoted with approval in *Navaratnam v. PP* [1973] 1 MLJ 154, the learned Fazl Ali J said:

> I must point out that the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intention or not. As the question of intention is not a matter of direct proof, the Courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had or had no *mens rea* for the crime. So in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account of its use is generally considered to be a strong circumstance against the accused.

For criminal breach of trust to be committed, it is important to find, as Fazl Ali J said:

> whether the accused was actuated by dishonest intention or not.

For that intention whether it was dishonest or not, as the question of intention is not a matter of direct proof, the Court would have to follow the tests which had been laid down from time to time for its guidance whether the 1st and 2nd appellants had or had no *mens rea* for the act.

For this element of *mens rea*, the Court with respect reject the 1st and 2nd appellants' claim of no *mens rea*. The Court does so reject when it looks at what transpired at the HSBC on 30 April 1985. The fact that transaction was 'open' and with the connivance even of the old Lien Hoe directors to the Court's mind, still taint the 1st and 2nd appellants' act with *mens rea*.

The Court did consider the dire need of the 1st and 2nd appellants to find the shortfall of six million dollars else the much postponed sale of Lien Hoe's shares would fall to the ground. The solution was the devised scheme to move or transfer somehow the RM12 million from Lien Hoe's account to Holdings to enable Holdings to pay and make up for that shortfall. The next question is did Lien Hoe's directors, that is, the 1st and 2nd appellants directors in the form of cheque P15 employ unlawful means to cause that wrongful loss to Lien Hoe and wrongful gain to Holdings? My answer is with due respect 'yes' for in signing P15 and transferring the RM12 million out of Lien Hoe, the 1st and 2nd appellants contravened s. 67 of the Companies Act and several articles of Lien Hoe's memorandum and articles of association P22 as submitted by the learned deputy which I accept as similar to s. 67 of the

Companies Act prohibition in art. 5 of P22 prohibiting any assistance in the purchase of its own shares, art. 104/95 of P22 no resolution, s. 131 of the Companies Act relating to the necessity of disclosure and s. 132(1) of the Companies Act when the 1st and 2nd appellants did not use reasonable diligence. I am in agreement with the authorities cited by the learned deputy *Halsbury's Laws of England* p. 70, para. 116 on the binding effect of the memorandum and articles of association on directors and para. 516 thereof where directors are liable for breach of their fiduciary duty. He also cited an article by Yashwant Rai Vyas [1989] 1 CLJ (Rep) x on duties of directors to act honestly with reasonable diligence and the necessity of disclosing interest. Much was said about the part played by Mr. Gan PW2. I am also in agreement with the deputy's submission that in doing so, the 1st and 2nd appellants have abdicated and breached their fiduciary duty. The facts that the old directors had connived is no defence to the 1st and 2nd appellants. It is also no defence that matters can be regularised as the test is whether the act was legal or regular in the first place when they were done.

With respect to the appellants, the Court has no reason to disturb the finding of fact of dishonesty by the learned Sessions Court Judge (see pp. 529 - 629 of appeal record Vol. II) on the principle that we should be slow to do so unless such finding is not borne out by the evidence. There was ample evidence for such a finding.

In respect of this 3rd charge, the 1st and 2nd appellants' Counsel adopted their earlier submission that the appellants were not directors of Lien Hoe at the relevant time when P15 was signed by them citing the case of *Chang Lee Swee v. PP* [1985] 1 MLJ 75 again for the proposition that since the appellants were not directors of Lien Hoe, they were therefore not entrusted with dominion.

Counsel submitted that the appellants should not have been called to their defence on this 3rd charge. The directors of Lien Hoe at the relevant time were the old directors of Lien Hoe.

On this charge, with respect, I find the 1st and 2nd appellants' ground of appeal to have no merit as well.

I have already held that the 1st and 2nd appellants were directors of Lien Hoe regarded so by those with whom they dealt with in particular PW7 (accountant) and PW4 (the bank manager of HSBC). I have also held they are "directors" as defined in s. 4 of the Companies Act in the broad sense.

I have no reason to disturb the finding of the learned Sessions Court Judge that the 1st and 2nd appellants that were at the relevant time officers in default and by their act in transferring money to Holdings to purchase Lien Hoe's shares which contravened s. 67 of the Companies Act which reads:

> 67.(1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares.
>
> (2) Nothing in subsection (1) shall prohibit:
>
> (a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;
>
> (b) the provision by a company, in accordance with any scheme for the time being in force,

of money for the purchase of or subscription for fully-paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company or a subsidiary of the company, including any director holding a salaried employment or office in the company or a subsidiary of the company; or

(c) the giving of financial assistance by a company to persons, other than directors, *bona fide* in the employment of the company or of a subsidiary of the company with a view to enabling those persons to purchase fully-paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

(3) If there is any contravention of this section, the company is, notwithstanding s. 369 not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.

Penalty: Imprisonment for two years or ten thousand ringgit or both.

(4) Where a person is convicted of an offence under subsection (3) and the Court, by which he is convicted is satisfied that the company or another person has suffered loss or damage as a result of the contravention that constituted the offence, the Court may, in addition to imposing a penalty under that subsection, order the convicted person to pay compensation to the company or the person, as the case may be, of such amount as the Court specifies, and any such order may be enforced as if it were a judgment of the Court.

(5) The power of a Court under s. 354 to relieve a person to whom that section applies, wholly or partly and on such terms as the Court thinks fit, from a liability referred to in that section, extends to relieving a person against whom an order may be made under subsection (4) of this section from the liability to have such an order made against him.

(6) Nothing in this section shall operate to prevent the company from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable on account of any financial assistance given in contravention of this section.

Following the order of submission of 1st appellant's Counsel, we agree to treat this appeal against the 2nd charge here.

The learned Counsels both contended that on the evidence adduced by the prosecution, it had not established a case to warrant the 1st appellant (and 2nd appellant) to be called to their defence. Counsels contended further in doing so, the learned Sessions Judge did not consider or consider adequately the evidence of PW6 and the learned Sessions Judge appeared to have been unduly influenced that the Holdings had no previous dealings with M/s. Ariffin & Low Securities.

The Counsels complained that the learned Sessions Judge failed to appreciate the evidence of PW6 that the RM2,500,751 was an advance taken by the 1st appellant.

Under this charge both Counsels for the 1st and 2nd appellants conceded that the prosecution had duly proved the ingredients that they were at the relevant time agents and directors and also that they were entrusted with dominion of Holdings' assets. The only ingredient they disputed is the one of 'dishonestly' or *mens rea*. Hence their complaint.

The learned deputy contended that the learned Sessions Court Judge had adopted the correct approach of considering the surrounding circumstances, conduct prior and subsequent of the 1st appellant and he drew an inference of dishonesty (see pp. 592A - 594D of appeal record). The learned deputy also submitted that in respect of this charge, the technical meaning of dishonestly under the Penal Code he submitted in the case of the 1st charge equally applies to this 2nd charge.

I considered whether the RM2.5 million could be an advance to the 1st appellant under clause 13 of memorandum & articles of association P22. Dishonesty being incapable of direct proof can only be gathered from the surrounding circumstances. That this was an advance is from the evidence of the prosecution itself in the form of PW5's evidence. That evidence has not been disbelieved by the learned Sessions Court Judge and fully backed up by documentary evidence of the prosecution P37 account entry No. 6 and 61 showing the practice and systems adopted by Holdings in giving advances to 1st appellant and the prosecution's P37 admits repayment having been made by the 1st appellant giving loan credits at some point of time. The advance transaction it appeared was recorded well before investigation into this case started and clearly adverted to the relationship of Holdings and the 1st appellant. Admittedly there is absence of any resolutions to provide for this loan but there is no denying that it would be a mere formality as the 2nd appellant would have signed the resolution in any event since he had signed the cheque. The other defect is that there was no security given by the 1st appellant for the loan or advance as required by art. 13 of the memorandum and articles of association of Holdings but the system has been not to give any security in the past for past loans as recorded in account No. 6 and No. 61 of P37.

The 1st appellant's and 2nd appellant's defence that it was a loan coincide with the evidence of PW5. The proper test the Court must ask even if the Court does not believe it or is not convinced of its truth is the time honoured test that we constantly and daily apply is - could it reasonably be true that it was a loan and my answer is it cannot be as alleged by the 1st and 2nd appellants in respect of this charge. It is trite law that if the prosecution does not agree that it was a loan, then it was their duty to impeach PW5 or disbelieve him for reason to be stated.

No doubt P37 records the transaction of what the 1st and 2nd appellants alleges to be a loan from Holdings to the 1st appellant. For there to be a loan Holdings must have money to give. It is perfectly clear to the Court according to PW2's evidence that on 30 April 1985 when Holdings wanted to pay for the Lien Hoe's shares, it had a shortfall of RM6 over million. To cover this shortfall Lien Hoe's newly appointed directors, 1st and 2nd appellants transferred RM12 million into the newly opened account of Holdings at HSBC. Shortly after 1st and 2nd appellants drew RM6.3 million from Holdings' account and paid Lien Hoe covering the shortfall. I make a finding of fact that the RM12 million was also to cover for this shortfall and payment of RM2.5 million to Ariffin & Low.

I make a finding of fact that when the 1st and 2nd appellants transferred RM2.5 million to Ariffin on 10 May 1985 to pay for Muda Shares Holdings could not give what it did not have in the first place and what Holdings has acquired by wrongful gain. I do make a finding of fact that the fact that the intention to siphon the RM2.5 million was thought of then when the 1st and 2nd appellants transferred the RM12 million originally to Holdings on 30 April 1985 since the shortfall was only RM6 over million why transfer RM12 million if not in contemplation of 'other debts' of the 1st appellant soon to be discharged.

In *Wallersteiner v. Moir* [1974] 3 All ER 217, 238 (not cited before me) Denning MR (I think speaking of dishonest intention) said:

> You have only to look at such cases as *Steen v. Law* and *Selangor United Rubber Estates Ltd. v. Cradock* to see the devices which they use. Circular cheques come in very handy. So do puppet companies. The transactions are extremely complicated, but the end result is clear. You look to the company's money and see what has become of it.

I therefore find the 1st and 2nd appellants' contention that RM2.5 million was a loan to be devoid of merit and cannot reasonably be true. I therefore reject the 1st and 2nd appeal in respect of this 2nd charge as well.

I refer now only to the 1st and 3rd charges. The appellants' Counsels say the learned Sessions Court Judge having called the 1st and 2nd appellants to their defence on the charges both Counsels contended that the Sessions Court Judge did decide wrongly by not looking at the defence and testing defence story on the principle whether defence can be given the benefit of a doubt.

The 2nd appellant's Counsel fiercely attacked the test applied by the learned Sessions Court Judge in his consideration of defence story. He referred the Court to learned Sessions Court's judgment at p. 615 of appeal record vol.II:

1. Whether *Roffel's* case could apply in Malaysia 2nd appellant adopts the submission made by the 1st appellant's Counsel on the point.
2. On para. 2 2nd appellant's Counsel complained that the learned Sessions Court Judge placed too high a burden on 2nd appellant (and 1st appellant) when he said:

   > Whether the Court believed that the two accuseds were actually ignorant ... and also persons of unbelievable naivety.

3. In para 3 the learned Sessions Court Judge said:

   > whether ... the Court believed their unawareness of legal niceties ... sufficient to get them off the hook.

4. In this paragraph the learned Sessions Court Judge used "whether the accused could get off the charges".

On these the 2nd appellant's Counsel contended that, bearing in mind these expressions used by the learned Sessions Court Judge, it would, he said, appear that there are other standards thatcould be applied to the defence case other than one having raised reasonable doubt.

The 2nd appellant's Counsel went further to show the standard of test applied by the learned Sessions Court Judge at p. 622 of appeal record Vol. II both wanted the Court to believe.

After having read the judgment of the learned Sessions Court Judge in its totality in respect of the 1st, 3rd charges (and 2nd charge), I am satisfied and agree with the learned deputy's reply that the learned Sessions Court Judge has correctly applied the burden of the defence in accordance with the case of *Mat v. PP* [1963] 29 MLJ 263, that is, the learned Sessions Court Judge after going through the defence evidence in respect of the 1st and 3rd charges (and 2nd charge) did not accept or did not believe the 1st and 2nd appellants' story and there he paused at stage (d) in the instructive decision in *Mat v. PP* where his duty was not to convict but to ask correctly whether the appellants' story raised a reasonable doubt. His answer was in the negative. I agree with the learned deputy that his approach was correct and I therefore have no reason to disturb his finding of guilt and convictions of the 1st and 2nd appellants in respect of the 1st, 2nd and 3rd charges. Their appeals are dismissed.

I now proceed to hear the 1st and 2nd appellants' and the learned deputy's cross-appeal against sentence on the 1st, 2nd and 3rd charges against the 1st and 2nd appellants.

Also found at [1991] 2 CLJ 1410